No. 00-1527

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH R. EVANNS,

Petitioner,

v.

AT&T CORPORATION, MCI CORP., PACIFIC BELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS AT&T CORP.'S AND MCI WORLDCOM, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Appellate Court correctly affirmed the District Court's determination that the filed tariff doctrine, which bars all claims challenging the terms of a common carrier's federally filed and approved tariffs, warranted the dismissal of a claim seeking monetary damages arising from the collection by common carriers of pass-through fees as required by the terms of the carriers' federal tariffs.

2. Whether a compelling reason to grant certiorari exists where the District Court's application of the relevant rules of the Federal Rules of Civil Procedure to the particular facts of this case did not constitute a departure from the accepted and usual course of judicial proceedings with respect to the following procedural issues: Denying a motion for entry of default; taking judicial notice of federally filed tariffs; denying leave to amend a claim clearly barred by federal law; and awarding sanctions for the filing of a frivolous motion.

3. Is it inappropriate for the Supreme Court to exercise its discretion by considering an alleged Constitutional challenge to the right of the Federal Communications Commission to require common carriers to contribute to the Universal Service Fund when the Petitioner failed to raise this issue before the District Court?

PARTIES TO THE PROCEEDING

Petitioner is Joseph R. Evanns, an individual.

Respondents are AT&T CORP., erroneously sued as "AT&T CORPORATION"; MCI WorldCom, Inc., erroneously sued as "MCI CORPORATION"; and PACIFIC BELL.

RULE 29.6 STATEMENT

Respondent AT&T CORP. is a New York corporation. It does not have a parent corporation and no publicly held company owns 10 percent or more of AT&T CORP. stock.

WorldCom, Inc., through its wholly-owned subsidiaries, provides local and long distance telecommunications services domestically and internationally. WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom, Inc. stock.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents AT&T CORP. ("AT&T") and MCI WorldCom, Inc. ("MCI WorldCom") respectfully request that this Court deny the Petition for Writ of Certiorari ("Petition") filed by Petitioner Joseph R. Evanns ("Petitioner") which seeks review of the Ninth Circuit Court's Memorandum (non published opinion, dated September 14, 2000) and its published Opinion (the "Opinion") of the same date, in this case. That Opinion is reported at 229 F.3d 837 (9th Cir. 2000).

TEXT OF OTHER STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition, 47 U.S.C. §402(a), 28 U.S.C. §2342(1) and the California Rules of Court, Rule 977(a) and (b) are also pertinent. They provide:

28 U.S.C. §2342(1)

§2342. Jurisdiction of court of appeals.

The Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

47 U.S.C. §402(a)

§402. Judicial review of Commission's orders and decisions.

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

California Rules of Court, Rule 977

(a) [Unpublished Opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

STATEMENT OF THE CASE

This case involves a garden variety application of the century-old filed tariff doctrine and raises no issue warranting review.

Petitioner filed this action on July 10, 1998, in the Los Angeles Superior Court, challenging the rates charged by the Respondents to their customers. These rates are special assessments which are collected by the Respondents to fund a program called the Universal Service Fund ("USF") mandated by the amendments to the Federal Communications Act of 1934, 47 U.S.C. §151 *et seq.* ("the FCA") and established under the rules promulgated by the Federal Communications Commission ("FCC"). Under these amendments, the FCC assessed long distance carriers, such as AT&T and MCI WorldCom, a fee calculated as a percentage of their revenues, to fund (among other things) the FCC's statutory obligation to provide Internet access to the nation's schools and libraries. Respondents AT&T and MCI WorldCom have filed tariffs approved by the FCC authorizing and requiring that each charge their customers the special assessments to recover a portion of their mandatory contributions to the USF. Petitioner's claims contend that this practice on the part of the Respondents is unlawful.

MCI WorldCom was served with the Summons and Complaint on July 17, 1998, and AT&T was served on July 20, 1998.

A. Removal of the Action

On August 13, 1998, within the 30 days in which a defendant is required to respond to a state court action, MCI WorldCom timely removed the action to the United States District Court, Central District. *See*, Excerpt of

Record ("Exc.") 2, Civil Docket Entry No. 1.[1] On August 19, 1998, within the 30 days in which AT&T was required to respond to the complaint, AT&T filed its Joinder In The Notice of Removal. *See*, Exc. 2, Civil Docket Entry No. 4.

B. The Motions to Dismiss

On August 20, 1998, AT&T and MCI WorldCom each filed a Motion To Dismiss, pursuant to *Federal Rules of Civil Procedure* ("F.R.Civ.P."), Rule 12(b)(6) and a Request For Judicial Notice of their respective tariffs filed with the FCC. *See*, Exc. 2, Civil Docket Entry Nos. 6, 7, 8, 9, 10. On August 24, 1998, Pacific Bell filed its own Motion to Dismiss and Request For Judicial Notice. *See*, Exc. 2, Civil Docket Entry Nos. 12 and 13.

C. The Requests for Entry of Default

On or about August 21, 1998, and again on August 24, 1998, Petitioner attempted to file requests to enter defaults of the Respondents for failure to plead or otherwise defend the action. *See*, Exc. 2. In support of his default requests, Petitioner incorrectly asserted that August 19 was Respondents' last day to respond, premised on the improper assumption that MCI WorldCom's Notice of Removal had been filed on August 12, 1998. *See*, Supplemental Excerpts of Record 43, Exh. A. On or about September 1, 1998, Respondents were served with yet

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[1] All citations to "Exc." refer to the Excerpts of Record filed in conjunction with the Petitioner's Appeal filed in the Ninth Circuit Court of Appeal.

another application for entry of default by Petitioner, filed at least 10 days after Respondents had filed their motions to dismiss. *See*, Exc. 2, Civil Docket Entry No. 23.

D. The Motion To Remand

On September 4, 1998, Petitioner filed his motion to remand. *See*, Exc. 2, Civil Docket Entry Nos. 15, 16, and 17. The motion was set for hearing on November 2, 1998.

E. AT&T's Motion For Sanctions

On October 6, 1998, Respondent AT&T served Petitioner with its intended sanctions motion pursuant to F.R.Civ.P. Rule 11(c)(1)(A). Petitioner refused to withdraw his motion for entry of default. AT&T thereafter filed its Rule 11 motion which was set for hearing concurrently with Respondents' motions to dismiss on December 14, 1998.

F. The Decision of the District Court

On November 2, 1998, the District Court denied Petitioner's motion to remand. The Court found that the allegations in the complaint effectively requested to invalidate a tariff rate as being unreasonable and accordingly, these allegations constituted a cause of action arising under federal law, creating federal subject matter jurisdiction. *See*, Exc. 4.

Also on November 2, 1998, the District Court denied Petitioner's motion for entry of default on the grounds

that Respondents had timely filed their motions to dismiss following the August 13, 1998 removal by Respondent MCI WorldCom.

On December 14, 1998, the District Court took judicial notice of the Respondents' federally filed tariffs and granted their motions to dismiss, finding that Petitioner's claims were governed by the filed tariff doctrine (also referred to in the Order as the "Filed Rate Doctrine") which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority". *See*, Exc. 3. The Court dismissed the action with prejudice.

Petitioner appealed to the Ninth Circuit Court of Appeal. On October 25, 2000, the Court of Appeal filed its unpublished Memorandum, submitted September 14, 2000, affirming the District Court's decision to take judicial notice of Respondents' tariffs, denying Petitioner's motion for entry of default, denying his motion for remand, and imposing Rule 11 sanctions against Petitioner's attorney. Also on October 25, 2000, the Ninth Circuit Court of Appeal, in its published Opinion, affirmed the District Court's dismissal of Petitioner's complaint on the basis that the filed tariff doctrine bars any claim, whether based on federal or state law, which attacks the Respondents' collection of the USF assessment in compliance with the terms of their filed tariffs.

Petitioner sets forth several misstatements of fact and law in his "Statement of Facts" regarding the procedural history of this case in the lower courts. Specifically, Petitioner states that 47 CFR 69.604 prohibits telephone companies from billing and collecting the USF charges

(Petition ["Pet."] at 1). Additionally, Petitioner states that "these charges were not to be passed through to consumers under FCC regulation." However, a reading of 47 CFR 69.604 (Pet. Appendix ["App."] at 28a) clearly shows that no such prohibition is included in this regulation. Rather, the regulation simply does not mandate that these charges be passed through to the consumers. However, Section 492 of the Federal Register (Pet. App. 4 at 30a), specifically *allows* for long distance carriers (the contributors) to pass their portion of the contributions on to their customers. Additionally, page 2 of the Consumer Information Fact Sheet (Exc. 19) clearly states, "As a result of this flexibility, long distance companies *are permitted to*, and do, take varying approaches to recovering the costs for their contributions to the universal service funding mechanism." (Emphasis added.)

Another factual error is Petitioner's statement that Respondents' Notice of Removal was filed on August 12, 1998, instead of August 13, 1998. The Civil Docket for the District Court (Exc. 2) clearly indicates that the Notice of Removal was filed on August 13, not August 12. This one-day difference is relevant in computing whether Respondents' Motions to Dismiss, filed on August 20, 1998, were timely.

Petitioner further misstates the grounds on which Respondents filed their Motions to Dismiss under Rule 12(b)(6). Petitioner states that the alleged basis for these motions was that the filed rate challenges could only be heard by the FCC. This is an incorrect statement of fact as the Motions to Dismiss were made on the basis that the filed tariff doctrine barred Petitioner's claims. Petitioner also erroneously states that Respondents opposed

remand on the same ground – that a challenge to a filed rate could only be heard by the FCC (Pet. at 3). Respondents' opposition to the remand motion was made on the ground that Petitioner's complaint presented a federal question – whether Respondents' conduct violated federal law – as the Ninth Circuit found (Pet. App. 1 at 5a). Moreover, Petitioner's statement that the parties were in agreement that the United States District Court was an improper forum (Pet. at 6) is clearly without any basis and is not supported by the record.

Petitioner's statement that, "defendants did not file a response by August 17 as required by Rule 81(c), F.R.Civ.P." (Pet. at 2) is also incorrect. Both the District Court and the Court of Appeal found that Respondents' responses were due under Rule 81(c) and Rule 6 by August 20, 1998.

Petitioner also misstates the Ninth Circuit Court's findings in its Opinion. Specifically, on page 6 of the Petition, Petitioner states that the, "Ninth Circuit recognized that plaintiff's cause did not involve a challenge to a filed rate," citing to footnote 21 of that Opinion. However, that statement is completely at odds with the Ninth Circuit's holding that, "The filed-rate doctrine bars any claim, whether couched in terms of federal or state law, attacking the defendants' collection of the USF assessment in compliance with the terms of the filed tariffs" (Pet. App. 2 at 16a).

Furthermore, Petitioner improperly cites as precedent the case entitled *Myron Blackman and Paul Mediano v. AT&T Corporation, MCI Telecommunications Corporation,* Civil No. ECDV 99-0142 RT (VAPx) (CD Cal. Eastern

Division, decided 3/3/2000) (the *"Blackman"* case). The *Blackman* decision is an unpublished, interlocutory order and, therefore, it is not a proper decision to cite as precedent, pursuant to California Rules of Court, Rule 977.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition for certiorari should be denied. It raises a cacophony of meritless allegations, none of which raises a question even remotely worthy of review by this Court. The principal issue in the District Court and the Court of Appeals was whether the filed tariff doctrine barred Petitioner Evanns' federal and state law claims for damages (he sought no equitable relief) for alleged overcharges on his telephone bill. Specifically he claimed it was unlawful for AT&T and MCI WorldCom to charge customers for their share of contributions these carriers were required to make to the federal government to a fund that was to be used to keep telephone service affordable. As both courts below found, the charges Petitioner challenges were set forth in tariffs filed with the FCC, and FCC regulations expressly authorized carriers such as AT&T and MCI WorldCom to impose the charges. Under long settled principles of law, any challenge seeking damages for imposition of the charges was therefore barred by the filed tariff doctrine. Petitioner has identified no conflict with any decision of a court of appeals or state supreme court respecting the application of the filed tariff doctrine in remotely similar circumstances.

The purported circuit conflicts Petitioner does assert are entirely contrived. Neither the Fifth Circuit's decision in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) or *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) involved an application of the filed rate doctrine. In *Texas OPUC*, the Fifth Circuit conducted a Hobbs Act review of FCC regulations implementing §254 of the Telecommunications Act of 1996, 47 U.S.C. §254, and (with small exceptions not relevant here) upheld those regulations. In *MCI WorldCom, Inc. v. FCC*, another Hobbs Act case, the D.C. Circuit upheld an FCC order eliminating the prior tariff filing regime of the Communications Act of 1934, 47 U.S.C. §203, for most forms of interstate service. But the order under review in that case eliminates tariffs prospectively, and will not take effect until September 2001 at the earliest.

Petitioner's remaining claims of error by the Ninth Circuit provide no basis for review, and are wrong in any event. As noted, the Ninth Circuit applied the filed rate doctrine in a correct and uncontroversial manner to the facts of this case. Nor was there any issue respecting the propriety of removal of this case to federal court pursuant to 28 U.S.C. §1404. On its face, Petitioner's state court complaint alleged violations of federal as well as state law. The District Court's other procedural rulings were likewise correct, including the ruling that Petitioner's conduct respecting his default motion was abusive and merited the imposition of sanctions. And Petitioner's wide-ranging additional challenges to the lawfulness of the federal universal service fee that AT&T and MCI WorldCom passed on to their consumers cannot be heard by this Court in this case for two reasons: (i)

Petitioner waived them by not presenting them to the District Court; (ii) the only permissible avenue for such challenges would be a Hobbs Act proceeding pursuant to 47 U.S.C. §402.

I. The Opinion of the Ninth Circuit Raises No Issue Warranting Review.

The underlying Ninth Circuit Opinion held that the basis of the District Court's dismissal of the Petitioner's complaint was grounded on sound federal law in its application of the filed tariff doctrine to the facts of this case. Thus, the Opinion simply follows nearly one hundred years of well-established case law. Since the USF charge is included in AT&T's and MCI WorldCom's tariffs, which are filed and approved by the FCC, these Respondents are required to collect, and Petitioner is required to pay, those charges. Thus, Petitioner's claim that the charge is unlawful is barred.

The Federal Communications Act of 1934, 47 U.S.C. §151 *et seq.*, regulates AT&T and MCI WorldCom as common carriers providing interstate telecommunication services and requires that they file tariffs with the FCC. These tariffs encompass "classifications, practices, and regulations affecting" charges, as well as the charges themselves. 47 U.S.C. §203(a). The provisioning and billing, as well as rates and all other terms of service, are thus addressed in these tariffs. Therefore, the rates charged by AT&T and MCI WorldCom for their telecommunication services, and any applicable surcharges including the USF, are governed exclusively by FCC tariffs, rules and regulations.

To ensure compliance with this statutory tariff-filing regime, the federal courts have applied a body of law, recognized as the "filed rate doctrine" or "filed tariff doctrine," which "forbids a regulated entity from charging rates 'for its services other than those properly filed with the appropriate federal regulatory authority.' " *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998). Thus, the published tariff constitutes the sole source of the rights and liabilities of the carrier and its customers with respect to tariffed services. *Maydak v. Bonded Credit Co.*, 892 F.Supp. 1304, 1309 (D. Or. 1995). However, the filed tariff doctrine is not limited to disputes regarding the applicable rates for tariffed services. The Supreme Court has expressly held that "the filed-rate doctrine is not limited to 'rates' per se". *Nantahala Power & Light Co. v. Thornburg*, 76 U.S. 953, 966 (1986).

The Opinion relied on the Supreme Court's decision in *American Telephone and Telegraph Co. v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956 (1998) (*"Central Office Telephone"*) wherein the Court expressly found that defendant's state law claims were preempted by the filed tariff doctrine even though the claims involved issues of provisioning and billing rather than pure rate setting. The Court upheld the long applied filed tariff doctrine to preclude state statutory or common law claims or defenses which attempt to vary the terms and conditions for services provided in the tariffs filed with the FCC. The Supreme Court stated:

> "The Ninth Circuit thought the filed-rate doctrine inapplicable 'because this case does not involve rates or rate setting, but rather involves the provision of services and billing' (citations

> omitted). Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim of excessive rates can be couched as a claim for inadequate services and vice versa. 'If discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . ". *Id.*, at 224 and 225.

With this decision, the Supreme Court confirmed nearly one hundred years of case law holding that the filed tariff doctrine precludes customers from bringing state statutory or common law claims or defenses against common carriers that arise under the provisions of their filed tariffs. The Ninth Circuit, following *Central Office Telephone*, found that the since the USF charges were included in the Respondents' tariffs, the filed tariff doctrine barred Petitioner's claims challenging those charges.

A. The Ninth Circuit Opinion Does Not Present A Conflict With The Circuit Court Decisions Relied On By Petitioner.

Petitioner argues that in relying on the *Central Office Telephone* decision, the Ninth Circuit's Opinion conflicts with the decisions of other United States Courts of Appeal. Specifically, Petitioner incorrectly claims that the Fifth Circuit case of *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 183 F.3d 393 (5th Cir. 1999) ("*Texas Office v. FCC*") reversed the FCC's assessment of USF contributions on carriers even though those

assessments were incorporated into the tariff filings. Petitioner argues that since the Fifth Circuit now holds that the carriers are free of any obligation to pay USF assessments, the Ninth Circuit's decision upholding Respondents' practice of continuing to assess these charges on their customers presents an intolerable conflict. However, Petitioner completely misinterprets the holding in *Texas Office v. FCC* and thus, his analysis is inaccurate. The challenge to the USF in that case was not that the charge was violative of any statute or the Constitution, but rather, the challenge pertained to that part of the FCC's order which set forth the rules determining which carriers should be required to pay the USF charges and the methodology of calculating those contributions. *Texas Office v. FCC* keeps *intact* the requirement under the Telecommunications Act of 1996 that Respondents pay the USF assessments. *See*, 47 U.S.C. §254(e). The Fifth Circuit *did* hold that the incumbent local exchange carriers ("ILECs"), such as GTE, were not required to recover universal service contributions from their interstate access charges. However, Respondents are not ILECs and thus not affected by that portion of the ruling. The *Texas Office v. FCC* decision did not, by any interpretation, eliminate the USF.

Petitioner also cites *MCI WORLDCOM, Inc. v. Federal Communications Commission* ("*MCI v. FCC*") 209 F.3d 760 (D.C. Cir. 2000) as purportedly being in conflict with the Ninth Circuit's Opinion. That case involved the review by the District of Columbia Court of the FCC's detariffing order requiring interexchange carriers such as AT&T and MCI WorldCom to cease filing certain tariffs with the

FCC after a prescribed date.[2] On February 13, 1997, the United States Court of Appeals for the District of Columbia stayed the detariffing order pending the resolution of the petitions for review filed by a number of carriers. On April 28, 2000, the District of Columbia Court denied the petitions for review and upheld the FCC's order requiring detariffing for interstate, domestic and interexchange services. Thereafter, on May 9, 2000, the FCC released a Public Notice by which the FCC established a transition period for the implementation of the detariffing order, ending January 31, 2001. During this transition period, carriers could maintain and file new and revised tariffs "for mass market interstate, domestic, and interexchange services," such as the tariffs at issue in this case. *See*, Respondents' Appendix 1, Public Notice at 3. However, the Court in *MCI v. FCC* did not address the question of the application of the filed tariff doctrine to claims for charges incurred after January 31, 2001, nor was that question before the Court. The decision was not retroactive and thus has no effect on the fact that the filed tariff doctrine is still binding law and applicable to Petitioner's claims concerning USF charges incurred in 1998. As such, the *MCI v. FCC* decision in no way conflicts with the Ninth Circuit Court's Opinion.

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[2] *In re Policy and Rules concerning the Interstate, Interexchange Marketplace Detariffing Order*, 11 F.C.C.R. 20730 (1996).

B. There Is No Division Between The Federal And State Courts Over The Application of the Filed Tariff Doctrine.

Similarly, the Opinion does not conflict with the state court decisions of *Day v. AT&T Corp.*, 63 Cal.App. 4th 325 (1998) and *Spielholz v. Superior Court*, 86 Cal.App. 4th 1366 (2nd Dis. 2001). In *Day*, Plaintiffs brought a claim for injunctive relief to prevent common carriers and retailers who sell prepaid phone cards to the public from engaging in misleading and deceptive advertising and also sought disgorgement by defendants of any allegedly ill-gotten gains under California Business and Professions Code, §17200. The Court held:

> "They [plaintiffs] may *not* seek to recover any money from respondents, whether they label their request one for disgorgement or otherwise. The net effect of imposing any monetary sanction on the respondents will be to effectuate a rebate, thereby resulting in discriminatory rates. As we have seen, this is a matter which is strictly of federal concern under the Federal Communications Act, and, therefore, barred by the file rate doctrine." *Day v. AT&T Corp.*, 63 Cal.App. at 337.

This decision is in complete harmony with the Opinion affirming the District Court's dismissal of Petitioner's similar claims with prejudice on the ground that the filed tariff doctrine precludes Petitioner's request for monetary damages, no matter how that request is characterized. *See*, Exc. 3 at 23. Since Petitioner's claims seek only monetary damages, the District Court dismissed the complaint. But relying on the *Day* decision, the Court specifically permitted Petitioner to file a new action in state court

under Section 17200, limited to only a claim for injunctive relief. Exc. 3 at 24. Thus, the *Day* decision does not conflict with the Ninth Circuit's Opinion.

Similarly, the *Spielholz* case does not present a conflict with the Ninth Circuit's Opinion. That case involved Section 332(c)(3)(A) of the Telecommunications Act which provides that a state may not regulate the entry of, or the rates charged by, a wireless telephone service provider. Plaintiff Spielholz contended that Section 332(c)(3)(A) did not preempt a state court from awarding monetary relief based on false advertising concerning *wireless service*. The Court of Appeal, Second Appellate District, agreed and noted:

> " . . . here it is undisputed that wireless telephone service providers in California are exempt from the tariff filing requirement. Since there is no tariff filing requirement, the filed rate doctrine is inapplicable." *See*, Pet. App. 6 at 64a.

However, unlike *Spielholz*, the case here does not involve wireless service. Instead, the USF charges are included in Respondents' tariffs governing long distance service and to which the filed tariff doctrine has been found applicable, as confirmed by the *Central Office Telephone* decision. Thus, *Spielholz* is distinguishable and is not inconsistent with the Opinion.

As the foregoing demonstrates, there is no conflict between the cases cited by the Petitioner and the Ninth Circuit Court's Opinion. Therefore, the Petition should be denied.

II. There Are No Compelling Reasons To Grant Certiorari To Review The Federal Jurisdictional and Procedural Issues Raised by Petitioner.

Rule 10 of the Rules of the Supreme Court of the United States clearly states that a petition for a writ of certiorari will only be granted for compelling reasons. Petitioner contends that the Ninth Circuit's affirmation of the District Court's rulings regarding various procedural issues "created a new rule favoring large corporate defendants who remove cases from State Court." As a result, Petitioner claims, "uncertainty and conflict now prevail within that appellate jurisdiction." (*See*, Pet. at 23).

Petitioner overplays the impact of the District Court's rulings. The rulings concerning the procedural issues turn solely upon the analysis of the particular facts involved and the application of the relevant Federal Rules of Civil Procedure to those facts. Thus, these rulings will have little, if any, affect on litigants other than those involved here. Where a question is one that concerns the judgment of the district court judge in relation to a particular set of facts and affirmed by the Court of Appeals, it will not be reviewed by the United States Supreme Court. *Appalachian [illegible]ver Company v. American Institute of Certified Public Accountants, supra*, 80 S. Ct. 16 (U.S.N.Y. 1959). This rule applies to the following portions of the District Court's decision:

A. Removal of the Action

The District Court, applying the provisions of F.R.Civ.P., Rule 81(c) in conjunction with F.R.Civ.P., Rule

6, found that Respondents timely removed the action, timely filed their motions to dismiss and, on that basis, denied entry of default against the Respondents. Even if Respondents had not timely filed their motions to dismiss (which Respondents deny), Petitioner would not have been entitled to have default entered against the Respondents. A responsive pleading filed after the expiration of the time allowed under the F.R.Civ.P. will nevertheless defeat entry of default when the pleading is filed before the application for entry of default. *Hudson v. State of North Carolina*, 158 FRD 78, 80 (SDW VA 1994). The District Court simply applied its judgment to the specific facts of the case in considering Petitioner's motion for default. Such a limited ruling does not present a sufficient compelling reason for review by this Court.

B. Denial of Remand

Not only did the Ninth Circuit find that this case was timely removed, it also found that it was properly removed on the basis of federal question jurisdiction and affirmed the District Court's denial of remand. The Opinion notes that Petitioner's complaint, on its face, presents a federal question, to wit, whether the special assessments collected by the Respondents to fund the USF mandated by the FCC are unlawful. Therefore, the District Court had original subject matter jurisdiction under 28 U.S.C. §1331. *See*, Pet. App. 1, Memorandum at 6a. Petitioner's claim that this ruling stands in contradiction to well-settled law is based on his mistaken belief that his complaint does not involve a federal question. Even if

this were true (which it is not), the Ninth Circuit's rejection of Petitioner's flawed analysis does not affect any litigant other than the Petitioner and its application is limited solely to this case.

Petitioner relies heavily on the unpublished *Blackman* decision, arguing that the Ninth Circuit chose not to address the ruling in that case. Under California *Rules of Court*, Rule 977(a) and (b), an opinion of a court of appeal or an appellate department of the superior court that is not certified for publication or ordered published cannot be cited or relied on by a court or a party in any other action or proceeding except under the doctrines of law of the case, res judicata, or collateral estoppel. In fact, in California, citation of an unpublished opinion may result in the imposition of monetary sanctions. *Alicia T. v. County of Los Angeles*, 222 Cal.App. 3d 869, 885-86 (Cal. Ct. App. 1990). Moreover, *Blackman* is only an interlocutory ruling from a district court and cannot be used as a precedent. District courts have the inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment. *In Re Terry Recee Fowler v. Malcom N. Elam*, 201 B. R. 771 (E.D. Tenn. 1996). Under the doctrine of *stare decisis*, a decision of a court is authority or binding precedent only in the same court, or in other courts of equal or lesser jurisdiction in subsequent cases where the very point is again in controversy. *See*, Black's Law Dictionary, (5th Ed. 1979) Stare Decisis, p. 1261. Thus, the *Blackman* decision is not binding authority on either the Ninth Circuit Court or this Court, therefore, it does not have any precedential value. It should never have been cited by Petitioner in the first instance.

C. Leave To Amend

Petitioner argues that, "litigants in the Ninth Circuit are now at a distinct disadvantage in that the courts in the Ninth Circuit may arbitrarily and without justification decide to deny the right to amend even if it appears that a case may have merit." (Pet. at 30). However, Petitioner's right to amend his complaint was not arbitrarily denied. Factors to be considered in review of a denial of leave to amend are undue delay, bad faith, futility of amendment, prejudice to the opposing party and the number of previous amendments. *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991). In its December 14, 1998 Order (Exc. 3), the District Court found that, " . . . the filed-rate doctrine precludes Plaintiff's request for *monetary damages*, whether characterized as a 'refund,' 'restitution,' 'rebate,' or otherwise." *See*, Exc. 3 at 23. Thus, any attempt by Petitioner to amend the complaint would have been futile. Based on the applicable law, and the futility of any amendment of Petitioner's claims in District Court, the denial of leave to amend was not an abuse of discretion and review by this Court is not necessary nor appropriate in these circumstances.

D. Judicial Notice

Petitioner claims that the taking of judicial notice of Respondents' filed tariffs by the District Court established a new rule in conflict with established criteria for judicial notice. Therefore, Petitioner contends that certiorari should be granted so to resolve the issue that, "litigants in the 9th Circuit may suffer a disadvantage *vis*

a vis litigants in other Circuits from this novel interpretation of what judicial notice may encompass." *See*, Pet. at 25. However, the Ninth Circuit affirmed this decision, finding that the tariffs are a matter of public record, a criterion for judicial notice, and cited two Ninth Circuit cases applying well-established criteria in support of its decision.[3] Further review of this issue is simply waste of this Court's valuable time and resources.

E. Sanctions

The Ninth Circuit's Opinion affirmed the imposition of sanctions against Petitioner's counsel based on the District Court's assessment of the evidence and the facts. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), the Supreme Court held that a district court abuses its discretion if it awards sanctions on an erroneous view of the law or clearly misinterprets the facts. Petitioner makes no such claim here. Since the evidence and facts are specific to this case, review by this Court is unnecessary and would not have any far-reaching effect other than on Petitioner and Petitioner's counsel.

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[3] *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772 (9th Cir. 1989) and *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646 (9th Cir. 1988).

III. Petitioners' Arguments That The USF Charge Is Unlawful Based On Various Constitutional Grounds Not Previously Raised Have Been Waived And Should Not Be Considered By This Court.

Petitioner claims that the USF is unconstitutional on seven different grounds as set forth in the "Questions Presented For Review, No. 10(a)-(g)" portion of the Petition. (Pet. at iii). Petitioner did not make these claims before the District Court and only raised them for the first time on appeal before the Ninth Circuit.

Ordinarily, the Supreme Court does not decide questions not raised or involved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The Ninth Circuit declined to address these issues which Petitioner first raised on appeal since he had failed to raise them in the District Court, citing *Marble Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996). Although courts of appeal have discretion to consider issues that have been waived, "(1) to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) to decide an issue when there has been an intervening change in the law; or (3) to decide an issue which is purely one of law and does not depend on an inadequately developed factual record," these circumstances are not present here. *Id.* at 1063. For these reasons, this Court should not entertain these claims raised in the Petition.

A. Petitioner's Constitutional Challenges to the USF Are Barred By The Filed Tariff Doctrine and by Federal Statutes.

Even if Petitioner had raised these claims before the District Court, they would be barred by the filed tariff doctrine. As discussed above, the filed tariff doctrine bars any claim that seeks judicial adjudication of the validity of the filed rates, regardless of the underlying cause of action or legal theory. *Marcus v. AT&T Corp. supra*, 138 F.3d at 58. Thus, a common carrier customer is barred from raising those affirmative defenses and claims which are otherwise properly maintainable. *See, e.g., Central Office Telephone, supra*, 524 U.S. at 222 (state breach of contract, tortious interference with contract claims and intentional misrepresentation); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (claim for breach of contract). Even claims for fraud have been held to be barred by a tariff. *See, Transportation Data Interchanges, Inc. v. AT&T Corp.*, 920 F. Supp. 86 (D. Md. 1996) and *Wegoland LTD v. Nynex Corp.*, 27 F.3d 17 (2nd Cir. 1994) (federal racketeering claims). Thus, Petitioner's argument that the imposition of the USF is invalid because its underlying statutory or regulatory basis is invalid is also barred by the application of the filed tariff doctrine.

Additionally, federal statutes require that Petitioner's Constitutional challenges to the FCC's decision which require carriers to contribute to the USF must be made by a direct appeal of the FCC's rulings. *See*, 28 U.S.C. §2342(1). *See also, Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996) ("Parties seeking to challenge the validity of FCC orders must do so through actions in the circuit courts under 47 U.S.C. §402 and 28 U.S.C.

§2342(1)."). Here, however, Petitioner is challenging the validity of the FCC ruling collaterally by attacking Respondents' tariffs in direct violation of 47 U.S.C. §402 and 28 U.S.C. §2342(1). For this reason as well, this Court should deny certiorari in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: May 4, 2001

RESPONDENTS' APPENDIX 1

PUBLIC NOTICE

May 9, 2000

DOMESTIC, INTEREXCHANGE CARRIER DETARIFFING ORDER TAKES EFFECT

COMMON CARRIER BUREAU IMPLEMENTS NINE-MONTH TRANSITION PERIOD

COMMENT SOUGHT ON MODIFICATIONS TO TRANSITION PLAN

DA 00-1028
CC Docket No. 96-61

COMMENTS: May 31, 2000

REPLY COMMENTS: June 9, 2000

On May 1, 2000, the Commission's 1996 order detariffing the interstate, domestic, interexchange services of nondominant interexchange carriers (IXCs) became effective.[1] In this Notice, the Common Carrier Bureau (1) implements a nine-month transition period ending January 31, 2001, in the manner specified by the Commission in the *Detariffing Order*, (2) seeks comment on possible modifications to the requirements for that transition period, and (3) provides technical guidance for carriers with respect to implementation of detariffing.

This Notice addresses only the immediate obligations of carriers under the *Detariffing Order*. During the transition period, the Commission's Consumer Information

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[1] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Detariffing Order*, 11 FCC Rcd 20730 (1996) (*Detariffing Order*).

Bureau intends to conduct several public forums aimed at ensuring that consumers are fully informed about their rights under this new regime.

Background

On October 31, 1996, the Commission released the *Detariffing Order* directing all nondominant IXCs to "cancel their tariffs for interstate, domestic, interexchange services on file with the Commission within nine months of the effective date of the order and not to file any such tariffs thereafter.[2] The Order was published in the Federal Register on November 22, 1996 and was effective on December 22, 1996. A number of carriers requested reconsideration of the *Detariffing Order*[3] and requested review from the Court of Appeals for the District of Columbia Circuit. On February 13, 1997, the court stayed the *Detariffing Order* pending judicial review. On reconsideration, the Commission modified its decision so as to allow (1) tariffing of dial around 1+ services using the carrier access code, and (2) tariffing of new customer services for a limited period of 45 days.[4] On further reconsideration, the Commission adopted public disclosure requirements regarding the rates, terms, and conditions governing

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[2] *Id.* at 20779, paras. 89, 90.

[3] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Order on Reconsideration, 12 FCC Rcd 15014 (1997) Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999) (*Second Order on Reconsideration*).

[4] *Order on Reconsideration,* 12 FCC rcd at 15034 and 15037, paras 32 and 39.

detariffed services.[5] On April 28, 2000, the court of appeals upheld the Commission's orders requiring detariffing for interstate, domestic, interexchange services.[6] On May 1, 2000, the court lifted the stay, and the rules adopted in the docket are now in effect.[7]

The nine-month transition period that the Commission adopted in the *Detariffing Order* began on December 27, 1996 but was interrupted after less than two months by the stay. In the *Order on Reconsideration*, the Commission declined to address any transition issues, and delegated authority to the Common Carrier Bureau to determine the appropriate transition period and to address other transition issues when the detariffing rules became effective.[8]

Transition Requirements

By this Notice, the Bureau establishes a new transition period beginning May 1, 2000 and ending January 31, 2001.

Carriers may file new and revised tariffs for mass market interstate, domestic, interexchange services during the transition period.

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[5] *Second Order on Reconsideration*, 14 FCC rcd at 6015, para 18.

[6] *MCI WorldCom, Inc., et al. v. FCC*, Opinion. 2000 WL 390520, No. 96-1459 (D.C. Cir. 2000).

[7] *MCI WorldCom, Inc., et al. v. FCC, No* 96-1459 (D.C. Cir. 2000).

[8] *Order on Reconsideration*, 12 FCC rcd at 15044 paras 52.

Carriers may not file new or revised interstate, domestic, interexchange tariffs for contract tariff offerings and other long-term service arrangements.[9] Pending public comment and further consideration by the Bureau, this prohibition applies to arrangements that bundle domestic and international services.

Carriers must cancel, by the end of transition period, the tariff offerings that are subject to the *Detariffing Order.*

Carriers are allowed to cancel their tariffs for interstate, domestic, interexchange service at any time during the nine-month period. Tariffs may be canceled by replacement, supplement, or expiration. A supplement is identical to a tariff page but should be designated as a supplement instead of a numbered page. The contents of the supplement should state: "Pursuant to the *Detariffing Order*, CC Docket 96-61, 11 FCC Rcd 20730 (1966), the tariff is canceled in its entirety effective (state date of cancellation)." Tariff cancellations must be submitted on diskette or CD-ROM, in Word Perfect 5.1, Microsoft Word 6.0 or Microsoft Word 97 software (see the attached Filing Guide for instructions). Pursuant to Section 1.1105 of the Commission's rules, tariff filing must be accompanied by a filing fee, which is currently six hundred thirty dollars ($630.00), per tariff filing.

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[9] Examples of such long-term service arrangements include AT&T's Tariff 12 options, MCI's special customer arrangements, and Sprint's custom network service arrangement. *Detariffing Order*, 11 FCC rcd at 20780, para. 90.

Carriers may cancel the portions of "mixed" services tariffs that are subject to detariffing by either: (1) canceling the entire tariff and refiling a new tariff for only those services that remain subject to tariff filing requirements; or (2) issuing revised tariff pages canceling the material in tariffs that relate to services subject to forbearance.

In order to minimize their costs, carriers may cancel several tariffs or revise several tariffs under one cover letter with the payment of one filing fee provided that each tariff has the same issuing carrier name and the issued date is identical for each tariff. In addition, organizations that file tariffs on behalf of several carriers may request waiver of applicable filing rules so that they may cancel the tariffs of several carriers or file revisions to tariffs of several carriers under one cover letter with the payment of one filing fee. Waiver of the applicable filing rules for this purpose must be requested by filing an Application for Special Permission, including the applicable filing fee, pursuant to sections 61.151, 61.152, and 61.153 of the Commission's rule. 47 C.F.R. §§61.151, 61.152, 61.153. The applicable rules to be waived are sections 61.20(b)(1) and 61.21(b) of the Commission's Rules. 47 C.F.R. §§61.20(b)(1). 61.21(b).

Ongoing Requirements for Detariffed Services

Geographic Rate Averaging and Rate Integration

Sections 64.1900(a) and (b) of the Commission's rules require that: "(a) A nondominant provider of interexchange telecommunications services, which provides detariffed interstate, domestic, interexchange service, shall file with the Commission, on an annual basis, a

certification that it is providing such services in compliance with its geographic rate averaging and rate integration obligations pursuant to section 254(g) of the Communications Act of 1934, as amended"; and, "(b) The certification filed pursuant to paragraph (a) of this section shall be signed by an officer of the company, under oath." 47 C.F.R. §§64.1900(a), (b).

Carriers with tariffs currently on file should file this certification letter (company logo, original and two copies) with the Secretary, FCC 445 12th Street, S.W., Washington D.C. 20554, Attention: Competitive Pricing Division, Common Carrier Bureau. This certification should be filed initially, at the same time and in a separate package as the filing that either cancels their domestic, interstate interexchange service tariff(s) or revises the existing tariff to remove references to interstate, domestic interexchange services. Carriers who are not currently providing such services, and therefore do not have tariffs on file with the Commission, should file this certification letter with the Commission by the time they begin to offer interstate, domestic interexchange services to the public. **Carriers are reminded that this certification filing is an annual requirement. There is no filing fee required for the certification letter.**

Public Disclosure

Section 42.10(a) of the Commission's rules requires that: [a] nondominant interexchange carrier shall make available to any member of the public, in a least one location, during regular business hours, information concerning its current rates, terms and condition for all of its

detariffed interstate, domestic, interexchange services. Such information shall be made available in an easy to understand format and in a timely manner. When responding to an inquiry or complaint from the public concerning rates, terms and conditions for such services, a carrier shall specify that such information is available and the manner in which the public may obtain the information: 47 C.F.R. §42.10(a).

Section 42.10(b) of the Commission's rules states that: "A nondominant IXC that maintains an Internet website shall make such rate and service information specified in paragraph (a) of this section available on -line at its Internet website in a timely and easily accessible manner, and shall update this information regularly. 47 C.F.R. §42.10(b).

Modifications to Transition Plan – Request for Comment

In its Petition for Reconsideration, AT&T argued that IXCs should be permitted to continue tariffing bundled domestic and international services during the transition period. In the *Order on Reconsideration*, the Commission delegated resolution of this and other transition issues to the Bureau.[10] We therefore seek comment on whether permissive tariffing should be permitted during all or part of the nine-month transition period for bundled domestic and international service offerings. We also seek comment on how quickly the IXCs that currently have websites should be required to come into full compliance

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[10] *Order on Reconsideration*, 12 Fcc Rcd at 15044, para. 52.

with the web posting requirement adopted in the *Second Order on Reconsideration*. Finally, we request comment on whether any other modifications should be made to the transition plan.

Parties are requested to provide comment on or before May 31, 2000. Replies will be due on or before June 9, 2000. Parties that wish to meet to discuss transition procedures and issues are requested to schedule meetings with the Competitive Pricing Division prior to the close of the comment period.

This matter shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 C.F.R. §§1.12000, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the representations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the reviews and arguments presented is generally required. *See* 47 C.F.R. §1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. §1.1206(b).

An original and four copies of all comments and reply comments must be filed with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 – 12th Street, S.W., TW-A325, Washington, D.C. 20554. In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 1231-20th Street, N.W.,

Washington, D.C. 20036, and one copy with the Chief, Competitive Pricing Division, 445 12th Street, S.W., T.W. – A225 Washington, D.C. 20554.

For additional assistance, contact the Competitive Pricing Division (202) 418-1540. In the Consumer Information Bureau, contact Peter Friedman, (202) 418-1400.